Supreme Court, U.S.
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No. 92-1094

In the Supreme Court of the United States

OCTOBER TERM, 1992

JOHNNIE BLAKE, PETITIONER

v.

HENRY G. CISNEROS, SECRETARY OF HOUSING AND URBAN DEVELOPMENT

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the court of appeals lacked jurisdiction under 28 U.S.C. 1295(a)(10) to entertain petitioner's appeal from a decision of the Housing and Urban Development Board of Contract Appeals, when the decision appealed from was not within the scope of the Contract Disputes Act of 1978, 41 U.S.C. 601 *et seq.*

2. Whether the court of appeals properly denied petitioner's motion to transfer the case to a district court under 28 U.S.C. 1631, when petitioner failed to demonstrate that it was in the interest of justice to do so.

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OPINIONS BELOW

The order of the court of appeals dismissing petitioner's appeal for lack of jurisdiction (Pet. App. 12a-16a) is unpublished, but the decision is noted at 979 F.2d 215 (Table). The orders of the court of appeals denying reconsideration and permitting the filing of a motion to transfer (Pet. App. 17a-18a), and finally denying petitioner's motion to transfer (Pet. App. 19a-21a) are unreported. The decision of the Housing and Urban Development Board of Contract Appeals (HUDBCA or Board) authorizing the Secretary to refer petitioner's debt to the Internal Revenue Service (Pet. App. 1a-10a) is

unreported, as is the Board's denial of petitioner's motion for reconsideration (Pet. App. 11a).

JURISDICTION

The order of the court of appeals dismissing petitioner's appeal was entered on August 25, 1992, and the order denying his motion for reconsideration was entered on September 23, 1992. The court of appeals' order denying petitioner's motion to transfer was filed on November 24, 1992. The petition for a writ of certiorari was filed on December 22, 1992. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. In 1982, petitioner Johnnie Blake and his former wife, Rebecca Lynne Blake, obtained a $12,000 property improvement loan from the Amoco Federal Credit Union (Amoco) and executed a promissory note in exchange. The loan was insured by the United States Department of Housing and Urban Development (HUD). Pet. App. 3a, 13a. Petitioner and his wife divorced in 1983. The divorce decree from Galveston County Family Court, to which neither Amoco nor HUD was a party, provided that Rebecca Blake would pay the debt to Amoco and would indemnify petitioner for his failure to pay that debt. Pet. App. 3a-4a.

In 1984, petitioner asked the Galveston County Family Court to enforce and clarify the divorce decree. In that proceeding, petitioner alleged that his ex-wife had refused to make payments on various debts, including the promissory note at issue here, and that as a result Amoco had garnished money from his paycheck. Pet. App. 4a. Amoco was made a party to the proceeding, and claimed that petitioner and his ex-wife were jointly and severally liable on the note. Pet. App. 4a-5a. The court issued rulings on various obligations of petitioner and his former wife other than the $12,000 note, but did not

release petitioner from liability to Amoco as to any of those debts. The court did not mention the $12,000 note at all. Pet. App. 5a-7a, 9a.

When neither petitioner nor his ex-wife made payments on the property improvement loan, Amoco assigned the debt to HUD in accordance with 24 C.F.R. 201.54. Pet. App 7a. After several attempts to collect on the loan, HUD notified petitioner that, pursuant to 31 U.S.C. 3720A and 24 C.F.R. 17.150 *et seq.*, it intended to ask the Internal Revenue Service (IRS) to offset the debt against any tax refund due to him. Pet. App. 13a-14a.

2. Petitioner filed a timely request to present evidence to the HUDBCA, pursuant to 24 C.F.R. 17.152, that the debt was not legally enforceable. The Board noted that the divorce court's order did not purport to release petitioner from any obligation to Amoco, and observed that, under well-settled law, Texas divorce courts have no power to disturb a creditor's right to collect from either party to a divorce on an obligation that the couple incurred jointly. The Board therefore concluded that HUD, as assignee of the defaulted loan, had the right to recover the amount owed by referring the debt to the IRS pursuant to 31 U.S.C. 3720A. Pet. App. 9a-10a. The Board denied petitioner's motion for reconsideration. Pet. App. 11a.

3. Petitioner then appealed the decision of the HUDBCA to the United States Court of Appeals for the Federal Circuit, but that court dismissed the appeal for lack of jurisdiction. The court of appeals noted that, under 28 U.S.C. 1295(a)(10), it has jurisdiction over a final decision of an agency board of contracts appeals only if that decision was made pursuant to the Contract Disputes Act of 1978, 41 U.S.C. 601 *et seq.* Because the United States did not benefit directly from the loan agreement and because the relationship between HUD and petitioner was not that of buyer and seller, the court held

that the loan agreement was not a procurement contract. Nor did the agreement provide for the disposal of personal property. The court therefore held that, even if petitioner was in contractual privity with HUD, his contract did not fall within the scope of the Contract Disputes Act, as outlined in 41 U.S.C. 602(a). The court stated that the only forum that might have jurisdiction to review the HUDBCA decision was a federal district court. Pet. App. 14a-16a.

4. Petitioner then filed a motion for reconsideration of the decision of the court of appeals. While that motion was pending, petitioner directly petitioned the United States District Court for the Southern District of Texas for review of the same HUDBCA decision. Pet. for Rev. of Admin. Order, No. G-92-455 (S.D. Tex. filed Sept. 22, 1992). Shortly thereafter, the court of appeals denied petitioner's motion for reconsideration, but granted petitioner leave to file a proper motion to transfer the appeal to a specific district court within ten days. Pet. App. 17a-18a. Petitioner then filed a motion in the court of appeals to transfer the case to the United States District Court for the Southern District of Texas. Pet. App. 19a.

The court of appeals denied petitioner's motion to transfer. The court noted that, under 28 U.S.C. 1631, cases should be transferred to cure a lack of jurisdiction "if it is in the interest of justice" to do so. The court held, however, that petitioner had failed to demonstrate that it was in the interest of justice to transfer this case. In particular, petitioner had not shown that the district court would have jurisdiction or that any time restrictions prevented him from seeking relief there in an original action. Pet. App. 20a-21a.

ARGUMENT

Petitioner contends that the court of appeals had jurisdiction over his appeal and, in the alternative, that the court erred in denying his motion to transfer the case to a district court. The decisions of the court of appeals were correct, however, and they do not conflict with any decision of this Court or of any court of appeals. Further review is therefore not warranted.

1. The court of appeals correctly determined that it lacked jurisdiction over petitioner's appeal. This Court has long held that the jurisdiction of the lower federal courts must be established by Congress. See, *e.g.*, *Finley* v. *United States*, 490 U.S. 545, 547-548 (1989); *The Mayor* v. *Cooper*, 73 U.S. (6 Wall.) 247, 252 (1868). "[C]ourts which are created by written law, and whose jurisdiction is defined by written law, cannot transcend that jurisdiction." *Finley*, 490 U.S. at 547 (quoting *Ex parte Bollman*, 8 U.S. (4 Cranch) 75, 93 (1807)). Even in the interest of justice, courts may not extend their jurisdiction if none exists. *Christianson* v. *Colt Indus. Operating Corp.*, 486 U.S. 800, 818 (1988).

Petitioner contends that the court of appeals had jurisdiction under 28 U.S.C. 1295(a)(10), which provides that the Federal Circuit may review "final decision[s] of an agency board of contract appeals pursuant to section 8(g)(1) of the Contract Disputes Act of 1978 (41 U.S.C. 607(g)(1))." Although this case does involve a decision of an agency board of contract appeals, that decision was not issued pursuant to the Contract Disputes Act.* The

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* Under 24 C.F.R. 20.4(b), the Secretary of HUD may assign "other matters" to HUDBCA. By regulation, the Secretary has directed the Board to decide, upon challenge, whether a debt owed to HUD and referred to the IRS for offset under 31 U.S.C. 3720A is past due and legally enforceable. 24 C.F.R. 17.152-17.153.

only executive agency contracts covered by the Contract Disputes Act are

> express or implied contract[s] * * * for —
>
> (1) the procurement of property, other than real property in being;
>
> (2) the procurement of services;
>
> (3) the procurement of construction, alteration, repair or maintenance of real property; or,
>
> (4) the disposal of personal property.

41 U.S.C. 602(a). As the court of appeals held (Pet. App. 15a), HUD did not agree to buy any property or services from petitioner, nor did the agency hire petitioner to dispose of any personal property. HUD realized no direct benefit from the transaction; as insurer, HUD merely furthered the general government policy encouraging lending for the rehabilitation of private housing. See *New Era Constr.* v. *United States*, 890 F.2d 1152, 1157-1158 (Fed. Cir. 1989). Thus, petitioner was not a party to a "Government contract" covered by the Contract Disputes Act, and so he is not a "contractor" under that Act. See 41 U.S.C. 601(4). He therefore may not appeal to the Federal Circuit under Section 8(g)(1) of the Act, 41 U.S.C. 607(g)(1).

Petitioner emphasizes that 41 U.S.C. 601(4) defines "contractor" as "a party to a Government contract other than the Government" and claims that he became a party to a "Government contract" when his promissory note was assigned to HUD. Pet. 7-9. But even assuming that petitioner is in contractual privity with the government, it is well established that not all contracts involving the government fall within the purview of the Contract Disputes Act. See, *e.g.*, *G.E. Boggs & Assocs.* v. *Roskens*, 969 F.2d 1023, 1026-1028 (Fed. Cir. 1992); *Coastal Corp.* v.

United States, 713 F.2d 728, 730 (Fed. Cir. 1983). As just shown, petitioner's contractual debt to HUD is not within the purview of the Act. The court of appeals' conclusion that it lacked jurisdiction to hear petitioner's appeal was therefore correct. Petitioner cites no case that suggests the contrary.

2. The court of appeals also correctly denied petitioner's motion to transfer his appeal to a district court. Under 28 U.S.C. 1631, if a court of appeals concludes that it lacks jurisdiction over an appeal,

> the court shall, if it is in the interest of justice, transfer such * * * appeal to any other such court in which the action or appeal could have been brought at the time it was filed or noticed * * *.

In this case, as the court of appeals observed (Pet. App. 20a), petitioner simply failed to demonstrate why it was in the interest of justice to transfer the case. For whatever reason, petitioner selected a wrong forum in which to seek relief. Perhaps if he had demonstrated that an appeal to another court would have been proper and that such an appeal would now be out of time, a transfer to that court would have been appropriate. But petitioner made no such showing to the court of appeals, and he makes no such showing now to this Court. Indeed, petitioner fails to mention that he has an action for review pending in the United States District Court for the Southern District of Texas.

While petitioner suggests that the court of appeals ruled that he had no right to seek review of the decision of the HUDBCA in any court (Pet. 3-4), that is not what the court of appeals held. The court of appeals merely held that it had no jurisdiction and that it would not transfer the case to a district court because petitioner made an insufficient showing under Section 1631. The court of appeals did not decide whether any other court

would have jurisdiction over petitioner's claim, for it was not called upon to decide that question. Whether the United States District Court for the Southern District of Texas has jurisdiction over petitioner's claim is an issue for that court to decide in the first instance.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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